

June 6, 2005

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Softsmiths, Inc.

Date of Filing: May 11, 2005

Case Number: TFA-0101

On May 11, 2005, Softsmiths, Inc. (Softsmiths) filed an appeal from a determination issued to it on April 4, 2005, by the Department of Energy's (DOE) Office of the Inspector General (OIG). In that determination, OIG responded to a request for documents that Softsmiths submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OIG's determination identified and released nine documents as responsive to Softsmiths' request. However, OIG withheld portions of the documents pursuant to FOIA Exemptions 5 and 6. This appeal, if granted, would require OIG to release the withheld information to Softsmiths.

I. Background

Softsmiths requested several categories of documents from OIG regarding an OIG report entitled "IG-0637 Electricity Transmission Scheduling at the Bonneville Power Administration":

1. List of all documentation collected and reviewed including: document name, author, date and version number, and source providing the document.
2. List of all individuals interviewed (internally-BPAT and externally).
3. Minutes of meetings held.
4. Criteria set used by audit staff to formulate project assessments and conclusions as to capabilities and viability.
5. Systems tests (functional and performance) performed by the audit team.
6. Comparative analysis of other similar systems performed to arrive at report conclusions.

Letter from OIG to Softsmiths (April 4, 2005) (Determination Letter). On April 4, 2005, the OIG issued a determination in response to Softsmiths' request. Determination Letter. OIG identified nine responsive documents, which it provided to Softsmiths.* Determination Letter at 1. However, OIG withheld certain portions of the nine documents, citing Exemptions 5 and 6 of the FOIA. *Id.* OIG stated that "[d]ocuments 3, 7, [and] 8 are released with material withheld pursuant to Exemption 6. Documents 1, 2, 4, 5, 6, and 9 are released with material withheld pursuant to Exemption 5 and Exemption 6." *Id.* OIG justified the withholdings by stating that "[t]he material that is withheld pursuant to Exemption 5 contains predecisional deliberative data that was subject to further review and possible change." *Id.* at 2. OIG also stated that "[n]ames and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemption 6...[t]he public interest in the identity of individuals whose names appear in these files does not outweigh these individuals' privacy interests." *Id.*

Softsmiths filed the present appeal on May 11, 2005. Letter from Softsmiths to OHA (May 4, 2005) (Appeal).

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency" memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated, under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion

* OIG identified 23 documents responsive to Softsmiths' request. However, 14 of the documents were generated by Bonneville Power Administration (BPA) and, therefore, OIG forwarded those documents to BPA for a determination concerning their release. See Determination Letter at 1. According to OIG, BPA was to respond directly to Softsmiths concerning release of those documents. At the time of the filing of this appeal, Softsmiths had not received a response from BPA regarding the 14 documents and, therefore, those documents are beyond the scope of this appeal. However, we contacted BPA to determine the status of Softsmiths' request regarding the 14 BPA documents. According to BPA, a determination on the request should be issued to Softsmiths "within the next couple of weeks." Electronic Mail Message from Annie Eissler, BPA, to Diane DeMoura, OHA (May, 19, 2005). In its Determination Letter OIG determined that certain information contained in the BPA documents should be withheld pursuant to Exemptions 5 and 6. Softsmiths may appeal BPA's determination concerning its 14 documents, including any withholding of information it claims at the direction of OIG.

among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

The documents in question are summaries of meetings held between OIG auditors and Softsmiths' personnel. They contain, *inter alia*, opinions and concerns raised by various parties in the meetings, discussions of decision-making procedures, and recommendations. After reviewing the documents, we find that they contain material that reflects OIG's deliberative process and are, therefore, exempt from disclosure under Exemption 5 of the FOIA.

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a document may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the document may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (*Reporters Committee*). Third, the agency must balance the identified privacy interests against the public interest in order to determine whether release of the document would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. See generally *Ripskis*, 746 F.2d at 3.

In this case, OIG found that release of the withheld information would result in the invasion of personal privacy interests in that the release of the information would disclose the identity of certain individuals. Releasing the names of the individuals, subordinates who were sharing their opinions or concerns with or making recommendations to their superiors, could allow a third party to connect the individual with a particular opinion or action raised or undertaken in conjunction with their work. This could, in turn, lead to those individuals being intimidated, harassed, or otherwise unable to perform their duties.

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. See *Reporters Committee*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; see also *National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

Upon reviewing the documents in question, we find that there is little, if anything, the public would learn about the workings of the government from the release of the withheld names and identifying information. Consequently, the public interest in such information is minimal at best. Therefore, after weighing the identified privacy interests present in this case against a minimal or even non-existent public interest, we find that release of information revealing the identities of federal employees could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The FOIA also requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b); see *Greg Long*, 25 DOE ¶ 80,129 (1995). We find that OIG complied with the FOIA by releasing to Softsmiths all factual, non-deliberative portions of the documents.

III. Conclusion

For the reasons stated above, we have determined that OIG properly withheld portions of responsive documents pursuant to Exemptions 5 and 6 of the FOIA. Therefore, Softsmiths’ appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed on May, 11, 2005 by Softsmiths, Inc., OHA Case No. TFA-0101, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 6, 2005